

**Maine Department of Environmental Protection**

**MAINE POLLUTANT DISCHARGE ELIMINATION SYSTEM (MEPDES)**

**FACT SHEET TO REISSUE A GENERAL PERMIT FOR CONSTRUCTION ACTIVITY**

**AGENCY:** MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION (DEP)

**ACTION:** NOTICE TO REISSUE MEPDES GENERAL PERMIT

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**SUMMARY:** The Maine Department of Environmental Protection (“DEP”) is providing Notice for reissuing a MEPDES general permit for discharges from construction activities to waters of the State of Maine other than groundwater, or to a conveyance leading to such waters. This MEPDES general permit describes permit coverage and limitations, definitions, requirements, procedures, performance standards, and standard conditions. There is also a section addressing the relationship of this permit to other programs.

**DATES:** The public comment period is from June 16, 2006, to July 17, 2006, interested persons may submit written comments on the general permit as part of the administrative record to the DEP, at the address given below, by no later than 5:00 P.M. July 17, 2006. E-mail and fax (207-287-7826) may also be used to submit comments. The Department intends to reissue this general permit effective July 21, 2006, and authorization to discharge under this general permit will expire January 20, 2008.

**PUBLIC MEETING INFORMATION:** Maine DEP is not intending to hold public meetings about the general permit. The changes to this general permit have largely focused on the Department’s goals of making the MCGP consistent with Stormwater Permit by Rule (“PBR”). As in Stormwater PBR, the MCGP now requires all applicants to submit an Erosion and Sedimentation Control (“ESC”) Plan. Material submitted with an application for a Site Law or Stormwater Management Law permit may be referenced to the extent it substantively addresses

the standards in Appendix A. If all the standards are not addressed, supplementary material must be provided with the NOI. If an applicant wishes the Department to rely in whole or part on a submission that is part of a Site Law or Stormwater Management Law application, the applicant should submit a letter with the NOI describing the previous submission and the extent to which it should be relied upon, and listing the standards addressed by any supplementary material.

There have been several formatting and organizational changes under Part IV. Procedure, of the MCGP to further clarify requirements. Written, but not oral, comments for the official permit record will be accepted no later than 5:00 P.M. July 17, 2006.

**PUBLIC HEARING INFORMATION:** No public hearing has been scheduled. Persons wishing to request a public hearing may do so in writing during the comment period. The request must state the nature of the issues proposed to be raised in the hearing. The Department will notify anyone commenting if a public hearing is scheduled. Such a hearing would provide interested parties with the opportunity to provide written and/or oral comments for the official record.

**ADDRESS:** The permit is based on an administrative record available for public review at Maine Department of Environmental Protection; 17 State House Station; Hospital Street; Augusta, Maine 04333. The following FACT SHEET AND SUPPLEMENTARY INFORMATION section sets forth principal facts and the significant factual, legal and policy questions considered in the development of the permit. A reasonable fee may be charged for copying requests.

**CONTACT INFORMATION:** A copy of the current permit is available on the web at <http://www.maine.gov/dep/blwg/comment.htm> Additional information concerning the permit may be obtained between the hours of 8:30 a.m. and 5:00 p.m. Monday through Friday excluding holidays from: David Ladd; Maine Department of Environmental

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Protection; 17 State House Station; Augusta, Maine 04333; telephone: 207-287-5404. E-mail:

[david.ladd@maine.gov](mailto:david.ladd@maine.gov)

## FACT SHEET AND SUPPLEMENTARY INFORMATION

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Note: This fact sheet references Maine statutes (M.R.S.A citations), Maine rules (CMR citations), Federal Clean Water Act, and Federal rules (CFR citations). See the specific web sites for texts, and note the currency of texts on each site.

- The texts of Maine statutes can be found at: <http://janus.state.me.us/legis/statutes/>
- The text of Department rules can be found at: <http://www.state.me.us/sos/cec/rcn/apa/06/chaps06.htm>
- The text of the Clean Water Act can be found at: <http://www.epa.gov/npdes/pubs/cwatxt.txt>
- The text of Title 40, Part 122 of the Federal rules can be found at: [http://www.access.gpo.gov/nara/cfr/cfrhtml\\_00/Title\\_40/40cfr122\\_00.html](http://www.access.gpo.gov/nara/cfr/cfrhtml_00/Title_40/40cfr122_00.html)
- Additional information concerning stormwater in Maine may be found at: <http://www.state.me.us/dep/blwq/stormwtr/index.htm>

### A. Introduction

On January 12, 2001, the EPA authorized the Department to administer the NPDES program in most areas of the State. The Department has incorporated certain requirements that were previously part of the federal program into Maine's stormwater program.

In 1987, Congress amended the Clean Water Act and added Section 402(p). This section required a comprehensive program for addressing storm water discharges. Section 402(p)(1) requires the U.S. Environmental Protection Agency (EPA), or delegated states, to address the following types of storm water discharges:

- Discharge subject to an NPDES permit before February 4, 1987;
- Discharge associated with industrial activity, including construction;
- Discharge from a municipal separate storm sewer system serving a population of 250,000 or more;
- Discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000; and
- A discharge that a NPDES permitting authority determines to be contributing to a violation of a water quality standard or a significant contributor of pollutants the waters of the United States.

Section 402(p)(6) required that EPA provide a comprehensive program that designates and controls additional sources of storm water discharges to protect water quality. Sources recently regulated by the second phase of the storm water program include smaller municipal storm water discharges from urbanized areas and discharges from small construction activities. The regulations promulgated under the authority of section 402(p)(6) are commonly referred to as the Phase 2 storm water regulations. The final regulations were published on December 8, 1999. *This general permit implements the requirements of both Phase 1 and Phase 2 programs for construction activities.*

The Department's general goals are to (a) integrate new requirements into the existing Maine stormwater program rather than maintaining a parallel, duplicative system, and better integrate parts of the existing Maine program; (b) build upon existing, familiar state definitions and resolve inconsistencies where appropriate; (c) use performance standards and a "permit by rule" approach where appropriate; and (d) create a system of predictable, consistent standards for small projects growing into large projects over time. Each of these specific goals also serves the general goals of supporting environmental protection and minimizing costs to both the regulated community and to the Department.

The Department initially proposed revisions to Chapter 500 (06-096 CMR 500), Stormwater Management, to build changes into the existing program. It was determined through a stakeholder process, there was insufficient time to address concerns and questions raised by this approach before construction projects would need to obtain coverage for discharges in Maine when the federal Construction General Permit expired in early 2003. The Department is proposing to extend the reissuance of the construction general permit for one year, expiring July 2007. During the period of this general permit, the Department will continue to work to better integrate new requirements into the state program.

This short-term general permit makes some progress in achieving each of the stated goals.

**Integrate new requirements into the existing Maine stormwater program, and better integrate parts of the Maine program.** The general permit makes reference to and relies upon related Maine programs, such as Site Location, Stormwater Management, Stormwater Permit by Rule ("PBR"), Gravel Pit and Quarry Laws, and Land Use Regulation Commission. The performance standards in the appendices are intended to provide a minimum set of standards for small projects, which are consistent with requirements that may be applied to larger projects under Site Location or Stormwater.

The Department has consolidated the Notice of Intent (NOI) and existing department applications where possible. For example, the NOI has been combined with the Site Law and Stormwater Management applications, so that the need to make a new and duplicative filing with the Department has been removed. In some cases, the Department also relies upon the standards in existing programs in lieu of standards contained in the general permit.

**Build upon existing, familiar state definitions and resolve inconsistencies where appropriate.** Examples of existing state definitions relied upon include "subdivision" (municipal and LURC), and "person", the latter being familiar from its use in Site Location, Stormwater, and NRPA.

**Use performance standards and a "permit by rule" approach, where appropriate.** The general permit uses an approach similar to the "permit by rule" program used under the Natural Resources

Protection Act. A person filing an NOI agrees to follow the standards, and submits sufficient information for the Department to be able to make a reasonable determination concerning whether the project is eligible to file an NOI and is likely to meet the standards. When the project is completed, a Notice of Termination (NOT) is submitted showing photos of the stabilized site.

The performance standards in the general permit largely substitute for the more extensive plan development requirements (storm water pollution prevention plans or SWPPPs) in the federal system, because the Department believes it is more protective of the environment, and efficient, to specify a short set of predictable performance standards appropriate for projects in Maine, and work to get them implemented on the ground, than to pursue the development of SWPPPs for every project of every size. The requirement of ESC plans designed to meet the specific performance standards.

**Create a system of predictable, consistent standards for small projects growing into large projects over time.** Care has been taken to view the proposed performance standards in light of requirements used in related state permits, so that developers expanding projects over time will not be faced with conflicting standards (although a larger project, or project closer to a protected natural resource, may need to meet additional requirements). Additional work needs to be done to build this approach into Chapter 500 (06-096 CMR 500).

## **B. Use of the General Permit Option**

Section 301(a) of the Clean Water Act (the Act) provides that the discharge of pollutants is unlawful except in accordance with a National Pollutant Discharge Elimination System (NPDES) permit, unless such a discharge is otherwise authorized by the Act. Title 38 M.R.S.A. Section 413 of Maine's waste discharge law provides that no person may directly or indirectly discharge or cause to be discharged any pollutants without first obtaining a license from the Department. Standards and requirements are specified in statute and rule. Although such permits are generally issued to individual discharges, EPA's and Maine's regulations authorize the issuance of "general permits" to categories of discharges (see 40 CFR Section 122.28 and 06-096 CMR 529(2)). The Department may issue a single, general permit to a category of point sources located within the same geographic area whose discharges warrant similar pollution control measures.

The Director of a NPDES permit program is authorized to issue a general permit if there are a number of point sources operating in a geographic area that:

- Involve the same or substantially similar types of operations;
- Discharge the same types of wastes;
- Require the same effluent limitations or operating conditions;
- Require the same or similar monitoring requirements; and
- In the opinion of the Director, are more appropriately controlled under a general permit than under individual permits.

"Construction activities" as defined and limited in the general permit for construction, and that meet the performance standards and procedural requirements of the general permit, discharge the same general types of waste and may be appropriately controlled in most cases through a general permit process, given standards and review processes also in place under other Maine laws such as Site Location, Stormwater, and Land Use Regulation Commission (LURC).

This general permit meets the requirements of 06-096 CMR 529, "General Permits for Certain Wastewater Discharges" and 06-096 CMR 521(9), "Storm water discharges".

**C. The General Permit -- Information concerning certain provisions.** The "Parts" referred to below refer to the parts of the general permit.

**Part I -- General permit coverage**

**Part V -- Limitations on coverage**

The general permit authorizes the direct discharge of stormwater from construction activity to municipal separate storm sewer systems (MS4s) and waters of the state other than groundwater.

In Part V (Limitations on coverage), discharges are specifically listed that are not authorized by the general permit.

**Part II -- Definitions**

The general permit makes use of existing state definitions when possible. These include "person", "direct discharge", and "subdivision" (municipal and LURC). The concept of "impaired waterbody" relies upon Maine's water classification laws.

Federal definitions used in the general permit include "construction activity", "disturbed area" (with additional clarification), storm water, and NOI and NOT.

Disturbed area. The definition of the term "*disturbed area*" is different in the NPDES rules and general permit from the definition used for the same term, for several years, under Maine's Chapter 500 (06-096 CMR 500). We have to make this definition consistent with the proposed Chapter 500 language. The federal definition does not contain the exceptions found in Chapter 500 for areas restored to certain standards within a specified period, and for certain redevelopment. The federal program does make an exception for routine maintenance, and the general permit includes this exception. The general permit defines "routine maintenance" as "maintenance performed to maintain the original line and grade, hydraulic capacity, and original purpose of the facility". This definition is consistent with the approach to routine maintenance taken by the Department under both the Site Law and the Stormwater Management law.

Construction activity. "*Construction activity*" has the same meaning as defined at 06-096 CMR 521(9)(b)(14)(x) and 40 CFR 122.26(b)(15). Construction activities include:

A construction activity including one acre or more of disturbed area, or an activity with less than one acre of total land area that is part of a common plan of development or sale, if the common plan of development or sale will ultimately disturb equal to or greater than one acre; or

Any other construction activity designated by the Department based on the potential for contribution to a violation of a water quality standard or for significant contribution of pollutants to waters of the State.

Based upon Maine's soils, topography, and extensive water resources, the Department has determined that the great majority of construction activities disturbing one acre or more will result in discernable concentrated

flows (direct discharges) to waters of the state. While construction activities may occur on a small minority of sites without causing a direct discharge due to favorable topography, soils and/or weather conditions (lack of rainfall), the Department has concluded that an accurate assessment of these factors in advance of a project's initiation is usually not feasible considering cost for the applicant or the Department. Unless a project is of extremely short duration (no more than a few days), the avoidance of a rain event producing runoff is a matter of chance. For this reason, the Department has determined that a construction activity that creates one or more acres of disturbed area will potentially result in a discharge to Maine waters unless the site is internally drained or will otherwise clearly not contribute runoff off-site. Such site conditions are very rare in Maine.

Because ground is not a perfectly level surface, sheet flow eventually channelizes. Sheet flow length, which means the distance sheet flow will travel before channelizing, varies based upon the individual site. However, in general, the USDA's Technical Release - 55 (TR55) "Urban Hydrology for Small Watersheds", which models stormwater flows, accepts a maximum length of sheet flow of 300 feet before shallow concentrated flow begins. This means that sheet flow is expected to channelize at or before 300 feet on all sites. Soil and Water Conservation Staff and Natural Resource Conservation District Staff have advised that, in practice, sheet flow will channelize on most sites at around 150 feet. If the erodability of the soils, degree of slope, concentration of flow, and other variables are considered, rill and gully erosion can occur much sooner than 150 feet. Rill and gully erosion occurs as the velocity of water increases and runoff begins to concentrate in shallow flows. This change in velocity results in additional removal of soil particles from the soil surface.

Common plan of development or sale. The federal concept of "*common plan of development or sale*" is defined in the general permit as a municipal or LURC subdivision. The requirements for subdivisions are integrated with programs that already address subdivisions at the state level. In using the subdivision definition, the Department is making the assumption, based upon many years of reviewing subdivisions, that a 3-lot subdivision will, conservatively speaking, disturb at least one acre of ground.

Impaired waters. The concept of "*impaired waters*" is important in both the federal program and Maine's existing waste discharge program. The practical effect for a construction activity authorized under the general permit, and discharging to an impaired waterbody, is that the erosion control plan requirements are stricter.

Federal rules (40 C.F.R. §122.4) provide that "no permit may be issued ... (i) [t]o a new source or a new discharger, if the discharge from its construction or operation *will cause or contribute* to the violation of water quality standards" (emphasis added). See also, 40 C.F.R. §122.44(d) (each NPDES permit shall include limitations of pollutants "that have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality").



The State of Maine's anti-degradation policy (in statute) provides that "[t]he department may issue a discharge license ... for a project affecting a water body in which the standards of classification are not met if the project does not cause or contribute to the failure of the water body to meet the standards of classification." 38 M.R.S.A. §484(4)(F)(3). See also 38 M.R.S.A. §414-A(1) (the department may issue a license for a discharge only if it finds that, among other things, "[t]he discharge either by itself or in combination with other discharges will not lower the existing quality of any body of water ..."); 06 CMR Chapter 523, Section 5(d)(1)(ii), (water quality based effluent limitations must be imposed to "control all pollutants ... which the Department determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality").

The Department has developed a list of water bodies that are not meeting classification standards. This list is called the "303(d) List", which refers to the section of the Clean Water Act that requires states to do this. The Department intends to annually update, with opportunity for public comment, a sub-list of the 303(d) list that will include waterbodies impaired due to nonpoint source pollution. This list may be referred to by applicants before sending NOIs to the Department, and the Department plans to make watershed maps available.

The general permit also states that the list does not restrict the Department's authority to use the best data currently available when considering an application of an individual waste discharge permit, or when an activity itself may have caused or contributed to the impairment. This approach balances the need for protection and restoration of identified impaired waters and notice to the regulated community of changes in the list.

Construction activities are not expected to cause or contribute pollutants to impaired waters, beyond a de minimis level, when all the requirements of this general permit are met. Construction activities are short-term rather than continuous. The Department recognizes that general permits are of limited duration, and requirements for construction activity seeking authorization under a future permit may need to meet additional requirements, if determined necessary by the Department to protect and restore impaired waterbodies.

The Department is not authorizing post-construction discharges under this permit. It is recognized that post-construction discharges need to be addressed, and the Department will be working to do so in the near future.

### **Part III -- Requirements**

This part of the general permit specifies the requirements for construction activities, and references specific NOI/NOT requirements in Part IV, and performance standards contained in the appendices. The requirements build upon and are coordinated with requirements under Maine's Stormwater Management and Site Location of Development laws, where appropriate.

Performance standards specified in the appendices to the general permit must be met in all areas for activities discharging to waterbodies or MS4s. Erosion and sedimentation control (ESC) plans are required in all areas for construction including 1 acre or more of disturbed area.

Erosion and sedimentation control (ESC) plans are required for all projects that require a permit.

The Department is using its discretion to waive NOI requirements for small subdivisions, in areas outside

LURC jurisdiction, that are not large enough to require review under the Site Law and that do not include facilities with enough impervious or disturbed area to trigger review under the Stormwater Law. The Maine Erosion and Sedimentation Control Law applies to disturbed areas, including less than one acre, in these smaller subdivisions.

#### **Part IV -- Procedure**

This part of the general permit specifies NOI and NOT requirements, including associated submissions. An

erosion and sedimentation control plan accompanying a Maine CGP must be designed by a professional who is registered, licensed, or certified in a related land-use field, or by education, training, or experience is knowledgeable in erosion and sedimentation control, or has received specific training in erosion and sedimentation control at a department-sponsored erosion and sedimentation control workshop. Authorization under the general permit requires prior submittal of certain information. Upon receipt of all required information, the Department may allow or disallow coverage under the general permit. Construction may not begin until the discharge is covered (authorized). The Department considers the submissions specified in the general permit to be the information minimally necessary to allow the Department to determine, as a factual matter, whether a discharge from a specific construction activity in Maine may appropriately be authorized under the general permit.

The Department proposed a rule change, consistent with the federal approach, to provide that the NOI review period be specified in the general permit. The Department will use the 14-day "permit by rule" type review process for small projects. The review period needs to be extended when a second application, such as for a Site Law permit, is required, so that the review periods coincide. This is necessary because the issues are intertwined. The Department also will propose to extend the review period to 30 days when an ESC plan is submitted to the Department for review.

Applicants should be aware that further changes to an erosion and sedimentation control plan, or other issues, may need to be addressed during the other (ex. Site Law) review process, after expiration of the 14 day period.

This Department is not adopting the federal approach, which requires an NOI be mailed 2 days before construction begins. Using a 2-day period means that when problems are found, they need to be addressed during construction, rather than before construction has begun. Changes are generally more difficult and expensive to make after construction begins, and the risk of environmental impacts are greater if appropriate controls are not put in place before the beginning of work. Doing a quick, prior review allows staff to work with applicants to correct some problems before construction begins, and to screen applications for appropriate follow-up or inspection where necessary.

#### **Part V -- Limitations on Coverage** (this Part was mentioned together with Part I)

#### **Part VI -- Relationship to other programs**

This part of the general permit addresses related waste discharge permits; Site Location, Stormwater, and Waste programs; quarry or excavation for borrow, clay, topsoil, or silt; silviculture activities, and activities performed by the Maine Department of Transportation or Maine Turnpike Authority. The general permit provides that the Department may combine certain application requirements of other Department programs

(such as the Site Law) with the NOI, and extend the NOI review period to coincide with that program. This will reduce filings for applicants, reduce the likelihood of someone unintentionally forgetting to file, and reduce certain administrative costs to the Department.

The standards under the *gravel pit and quarry programs* are relied upon in lieu of the standards in the general permit for excavations coming under those programs, with certain exceptions. These standards appear at 38 M.R.S.A. §§ 490-D and 490-Z. Smaller operations disturbing one acre or more need to meet the requirements of the general permit.

Authorization under the general permit is not required for non-point *silviculture activities* as provided in 06-096 CMR 521(10). This provision merely references existing regulatory provisions. Note the provisions in the exemption for *agricultural activities* in statute at 38 M.R.S.A. § 413(2).

Construction activities conducted by the Maine Department of Transportation (MDOT) pursuant to a Memorandum of Understanding (MOA) between the Department and MDOT are authorized under this general permit within the limits of coverage specified in this general permit. MDOT is be considered a qualifying state program. The MOA is being updated by the agencies.

## **Part VII -- Standard conditions**

This part lists a short set of standard conditions, and references other standard conditions applicable under existing rules. The first standard condition listed prohibits discharges to certain classifications and sizes of waterbodies, repeating text currently in rule. The Department is proposing certain statutory and regulatory changes that would affect this section.

## **Appendices**

Discharges from construction activities typically contain sediment from eroded soil due to its exposure during the construction activity. Other pollutants may include nutrients and toxics, including oil and grease, from construction equipment. The general permit establishes performance standards (see Appendices A through C of the general permit) to limit the exposure of soil, to require erosion control measures be taken where soil is exposed, and to provide for prompt stabilization following construction activity. Performance standards for inspection and maintenance activities are included, which are important components in the federal system and have been identified as weak areas in Maine's stormwater program. A short list of standards also addresses spill prevention; groundwater protection; fugitive sediment and dust; debris and other materials; trench or foundation dewatering; and certain authorized non-stormwater discharges.

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